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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 128

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

JOHN P. McELROY, et al.,
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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TABLE OF CONTENTS.

	Page
Prayer	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting Writ	4
Conclusion	20
Appendices:	
A. Opinion of the District Court	21
B. Opinion of the United States Court of Appeals for the Seventh Circuit	24
C. Statutes Involved	36
D. Enginemen's Press News Article, March 8, 1968	39

TABLE OF AUTHORITIES.

Cases.

Broady v. Illinois Cent. R. Co., 191 F. 2d 73 (7th Cir. 1951) (cert. den. 342 U. S. 897)	6
Brooks v. Chicago, R. I. & P. R. Co., 177 F. 2d 385 (8th Cir. 1949)	5
Butler v. Thompson, 192 F. 2d 831 (8th Cir. 1951)	4, 5
Conley v. Gibson, 355 U. S. 41 (1957)	17
D'Amico v. Pennsylvania Railroad Co., 191 F. Supp. 160 (D. C., N. Y. 1961)	10
Douds v. Local 1250, 173 F. 2nd 764 (2nd Cir. 1949)	6

Edwards v. St. Louis-San Francisco Railroad Co., 361 F. 2d 946 (7th Cir. 1966) 6, 16
Elgin, Joliet & Eastern Ry. Co. v. Burley, 325 U. S. 711 (1945) 11
Elgin, Joliet & Eastern Ry. Co. v. Burley, 327 U. S. 661 (1946) 9
Estes v. Union Terminal Co., 89 F. 2d 768 (5th Cir. 1937) 11

General Committee v. Southern Pacific Co., 132 F. 2d 194 (9th Cir. 1942) (Rev'd. on Jurisdictional Grounds 320 U. S. 338) 11

Hughes Tool Co. v. National Labor Relations Board, 147 F. 2nd 69 (5th Cir. 1945) 7

National Labor Relations Board v. Blades Mfg. Co., 344 F. 2nd 998 (8th Cir. 1965) 6
National Labor Relations Board v. Posner, 342 F. 2nd 826 (2nd Cir. 1965) 6

Steele v. Louisville and Nashville R. Co., 323 U. S. 192 (1944) 17

United Steelworkers v. Warrior & G. Nav. Co., 363 U. S. 574 (1960) 14

Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515 (1937) 11, 12

Statutes.

Railway Labor Act:
Section 2, Second 2, 3, 10
Section 2, Third 2, 4
Section 2, Fourth 2
Section 2, Sixth 2
Section 2, Ninth 2
28 U. S. C., § 1254 (1) 2

Other.

Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482 (1952) 16
Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956) 20
Cox, Some Aspects of the Labor Management Relations Act, 61 Harv. L. Rev. 274 (1948) 16
Federal Telephone & Radio Co., 107 NLRB 649 (1953) 6
H. R. 7650 before Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 44, 89 (1934) 10
Wyle, Labor Arbitration and the Concept of Exclusive Representation, 7 B. C. Ind. & Com. L. Rev. 783 (1966) 16
Youngstown Cartage Co., 146 NLRB No. 34 (1964) .. 6

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Petitioner, Terminal Railroad Association of St. Louis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on February 28, 1968. The Brotherhood of Locomotive Engineers has also sought such review in Docket No. 1417. The original transcript of record in this case has been filed with the Clerk of the Court in Docket No. 1417.[1]

[1] The appendices to the briefs submitted to the Court below by the petitioner and the individual respondents have been certified as the record for use with this petition. The pages have not been renumbered. "P. A." refers to plaintiffs-appellants' appendix. "Appendix" refers to the appendices in this petition. The certified record also includes the proceedings in the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The opinion of the District Court, set forth in Appendix A hereto, is not reported. The opinion of the Court of Appeals for the Seventh Circuit, set forth in Appendix B hereto, is not yet officially reported, but is unofficially reported at 67 L. R. R. M. 2681.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 28, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Must a railroad whose locomotive engineers have duly designated one union as their collective bargaining representative meet and treat with a rival minority union to adjust grievances of employees in the engineers craft simply because a few individual employees desire the minority union to represent them?

2. Does the Railway Labor Act contemplate and provide that the exclusive role of the collective bargaining agent of a craft necessarily includes the adjustment of grievances?

STATUTES INVOLVED.

Set forth in Appendix C hereto are Sections 2 Second, Third, Fourth, Sixth, and Ninth of the Railway Labor Act (45 U. S. C. 152, Second, Third, Fourth, Sixth and Ninth).

STATEMENT OF THE CASE.

A majority of the members of the craft of locomotive engineers on the Terminal Railroad Association of St. Louis (TRRA) have duly selected the Brotherhood of

Locomotive Engineers (BLE) as their collective bargaining representative under the Railway Labor Act to bargain with the railroad concerning rates of pay, rules, and working conditions (P. A. 3). On November 15, 1965, TRRA entered into a collective bargaining agreement with BLE which provided that only BLE may represent locomotive engineers in the handling of grievance matters (P. A. 6). The agreement does not in any way limit the individual engineer's right to represent himself in these matters. In compliance therewith, TRRA has refused to process the grievances of locomotive engineers which are presented and handled by representatives of the Brotherhood of Locomotive Firemen and Enginemen (BLF&E), a rival union which represents the craft of locomotive engineers on a very few railroads and which actively solicits membership in the craft of locomotive engineers on all railroads, but represents only the craft of firemen on TRRA.

On January 10, 1967, fifty-two locomotive engineers including respondent, John P. McElroy, filed a complaint in the United States District Court for the Eastern District of Illinois, alleging that TRRA violated Section 2 Second of the Railway Labor Act (45 U. S. C., § 152 Second) by not meeting with respondents' representative, BLF&E, to adjust grievances, Section 2 Third, by attempting to coerce them in the selection of their representatives, and Section 2 Fourth, by attempting to induce them to join BLE. Respondents asked the District Court to declare the agreement of Nov. 15, 1965, illegal and to permanently enjoin TRRA from applying it (P. A. 2-12). BLE intervened (P. A. 20-34).

On June 12, 1967, the District Court sustained TRRA's motion to dismiss for lack of jurisdiction (Appendix A). The Court of Appeals for the Seventh Circuit, however, finding first that an individual employee has a privilege under the Railway Labor Act to be represented in the

handling of grievances by a minority union of his choice, held that the District Court had jurisdiction to enforce that privilege (Appendix B). TRRA here seeks review of that decision.

REASONS FOR GRANTING WRIT.

The basic question involved here is whether or not a railroad must confer and adjust grievances with rival minority unions. As will be shown, the question is important to the successful application of the Railway Labor Act. Its proper resolution is necessary to peaceful labor relations in the railroad industry, particularly in view of the conflict between the decision of the Court below and those of other circuits.

1. The decision below is in conflict with decisions of the Court of Appeals for the Eighth Circuit which has ruled under both the Railway Labor Act and the National Labor Relations Act that an employer has no duty to meet with minority unions to adjust grievances. In **Butler v. Thompson,** 192 F. 2d 831 (8th Cir. 1951), the railroad had discharged a dining car waiter for using intoxicating liquor while on duty, and arguing that the collective bargaining agreement limited the choice of representative to "an employee," had not allowed the waiter to appear at his grievance hearing with an officer of a minority union. Relying on Section 2 Third of the Railway Labor Act, the employee filed suit for reinstatement and lost wages. The district court dismissed for want of jurisdiction, and on appeal, the Eighth Circuit affirmed, holding that provisions in the collective bargaining agreement concerning the choice of grievance representative are controlling and are not voided by the Railway Labor Act:

> "The statute recognizes a distinction between proceedings on the company level and those before the

> Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an existing legal contract controls, whereas the procedure before the Board is controlled by the Statute." 192 F. 2d at 833.

Although the Court of Appeals in the present case attempted to distinguish **Butler** as a case involving "rival" unions, it is clear from the discussion above, that BLE and BLF&E do compete on the TRRA and on all railroads for members in the craft of locomotive engineers. These two cases have the same basic facts and there is an obvious conflict between the present case and **Butler**. This Court should resolve that conflict, for the issue involved is important to the administration of the Railway Labor Act. To permit a conflict in federal decisions resulting in varying practices on different railroads in different parts of the nation harms labor-management relations in the railroad industry, an industry otherwise noted for the uniformity of its labor practices.

Another decision of the Eighth Circuit which is in direct conflict with the opinion of the Court below is **Brooks v. Chicago, R. I. & P. R. Co.**, 177 F. 2d 385 (8th Cir., 1949). In **Brooks**, the Court ruled that it had no jurisdiction to consider the question relating to an agreement between the carrier and the bargaining agent which restricted the manner of representation of employees at company level grievance proceedings. The Court stated, l. c. 391: "The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees. . . ."

If the decision of the Court below is allowed to stand with the existing conflict of opinions between the Seventh and Eighth Circuits, on the same subject matter, Petitioner will be faced with a situation where its agreement

of November 15, 1965, would be valid as to its Missouri employees and invalid as to its Illinois employees.[2]

Moreover, the decision in the present case, to the extent that it represents a formulation of federal labor policy, also conflicts with several decisions of other courts of appeals. The Court of Appeals for the Eighth Circuit has held under the National Labor Relations Act that an employer has no duty to adjust grievances with unions other than the exclusive bargaining representative of the unit. **National Labor Relations Board v. Blades Mfg. Co.**, 344 F. 2d 998 (8th Cir. 1965). There, the employer refused to meet with a union which had been rejected by a majority of the employees in an election. The court said:

> "Since we have found that the company was under no duty to recognize and bargain with the union which did not validly represent a majority of its employees, the company was not in violation of § 8 (a) (5) in refusing to adjust their grievances with a union representative." 344 F. 2d at 1004.

The Court of Appeals for the Second Circuit has also held that under the National Labor Relations Act an employer has no duty to adjust grievances with minority unions. **National Labor Relations Board v. Posner**, 342 F. 2d 826 (2nd Cir. 1965). At one time the Second Circuit had ruled that the Act did not forbid minority unions from adjusting grievances where the collective bargaining agreement did not cover the matter. **Douds v. Local 1250**, 173 F. 2d 764 (2nd Cir. 1949).[3]

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[2] It is to be noted that the decision of the Court below is also in direct conflict with two of its own decisions. See, **Broady v. Illinois Cent. R. Co.**, 191 F. 2d 73 (7th Cir., 1951) (Cert. den. 342 U. S. 897); **Edwards v. St. Louis-San Francisco Railway Co.**, 361 F. 2d 946 (7th Cir., 1966).

[3] The National Labor Relations Board, however, has declined to follow **Douds**. See, **Federal Telephone & Radio Co.**, 107 N. L. R. B. 649 (1953); **Youngstown Cartage Co.**, 146 N. L. R. B. No. 34 (1964).

However, in **Posner**, the Second Circuit has repudiated and overruled, albeit *sub silentio*, the **Douds** case. The **Posner** case held that an employer who refuses to adjust grievances with a union organizer at a time when the union had not yet acquired majority support did not commit an unfair labor practice. The court said:

> "We have found no decisions which hold that an employer, pursuant to Section 8 (a) (1), must discuss grievances with a union organizer who represents only a minority of his employees." 342 F. 2d at 829.

The Court of Appeals below relied on **Douds** in reaching its decision. Apart from the fact that **Douds** is no longer precedent in the Second Circuit, Judge Learned Hand experienced much difficulty with the problem, clearly recognizing that his ruling might well "cause confusion in administration and introduce that strife between rival unions which was one of the chief purposes of the Act to prevent." 173 F. 2d 764 at 771.

The Court of Appeals for the Fifth Circuit has supported the Board's position on the exclusion of minority unions from grievance procedures. **Hughes Tool Co. v. National Labor Relations Board**, 147 F. 2d 69 (5th Cir. 1945), interpreting Section 9 (a) of the National Labor Relations Act as it read before the 1947 amendments, held that an employer who allowed a minority union to adjust grievances committed an unfair labor practice. The court disregarded as immaterial, evidence that the collective bargaining agent had exhibited hostility towards members of a minority union and had refused to process their grievances, ruling that the individual's right to present a grievance does not include the right to choose a minority union as representative.

The present case conflicts with the **Blades**, **Posner** and **Hughes** cases on a general issue of federal labor policy and with the **Butler** and **Brooks** cases on the specific issue

under the Railway Labor Act. It is clear, then, that the various courts of appeals require the leadership of this Court to formulate federal labor policy with respect to the role of the collective bargaining agent and minority unions in the grievance process.

2. The Court below sought to treat this matter as involving only the right of an individual employee to present, handle and confer with railroad management over his grievances. Thus, Circuit Judge Cummings said:

> "It is unnecessary to decide whether the Railway Labor Act would entitle plaintiffs to designate a minority union seeking to dislodge Engineers' Union. Our holding is simply that these plaintiffs, already members of the Firemen's Union, can designate that union to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers" (Appendix B, p. 34).[4]

This approach blinks at reality. The BLF&E is a rival minority union and competes with the BLE for members in the craft of locomotive engineers at TRRA and on all railroads. Moreover, since the Award of Arbitration Board No. 282, 41 Labor Arbitration Reports 673, has sharply reduced the number of firemen employed on American railroads, it must be recognized that as an organization BLF&E is anxious to expand its membership in the craft of locomotive engineers. Therefore, by requiring the TRRA to meet with the BLF&E to adjust engineers' grievances, the Court of Appeals for the Sev-

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[4] The question of representation before the Adjustment Board is not involved in this case; the agreement provisions involved relate only to the handling of grievances on the railroad itself.

enth Circuit has given it an effective weapon to seek to dislodge BLE.[5]

Petitioners submit such a result is highly undesirable and erroneous. The Railway Labor Executives Association and the American Federation of Labor in their *amici curiae* brief on reargument in **Elgin, Joliet & Eastern Ry. Co. v. Burley**, quoted by Mr. Justice Frankfurter (dissenting opinion), 327 U. S. 661, described the problem when the duly designated representative does not handle grievances arising under its contract:

> "In summary, therefore, we submit that the regulatory scheme of the Railway Labor Act requires for its effective operation a recognized authority in the collective bargaining representative to proceed in its own right to adjust disputes regarding the interpretation or application of agreements. A denial of that right will produce no real benefits to individual employees, will impair the effectiveness of representatives as stabilizing influences in this field, will deprive the carriers of any agency to which they may go to secure a final settlement of many vexatious labor controversies and will bring about a general deterioration of relations between employees and management which will necessarily impair the paramount interest of the public in uninterrupted transportation." 327 U. S. at 671.

To require that a railroad handle grievance matters with a minority union in active competition with the majority union will magnify many times the problems described above.

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[5] How the BLF&E made use of the Court of Appeals' decision to further its own organizational efforts is shown in the "news" story which appeared in the March 8, 1968 issue of BLF&E's official weekly newspaper, "Enginemen's Press." See Appendix D.

The Court of Appeals in its decision gave Section 2 Second of the Railway Labor Act (45 U. S. C., § 152 Second) a literal reading to support its decision and erroneously stated that such an interpretation found support in the Act's 1934 legislative history. The Court of Appeals said:

> "In the House hearings, both Commissioner Eastman and George Harrison, the spokesman for the standard railroad labor unions, expressed the view that railroad employees have the right to be represented by minority unions in grievance matters" (Appendix B, p. 28).

citing Hearings of House Committee on Interstate and Foreign Commerce (73rd Cong., 2d Sess.) on H. R. 7650 at pp. 44, 89.

However, reference to that testimony reveals no mention by either of those gentlemen of minority union representation in grievance matters. Indeed, both stressed that the language in the Act, relied on by the Court below, was intended to protect the rights of the **individual** to prosecute and handle **his own** grievances if he so desired.

The case of **D'Amico v. Pennsylvania Railroad Co.**, 191 F. Supp. 160 (D. C. N. Y. 1961) makes clear that "representatives" in Section 2 of the Railway Labor Act does not apply to grievance proceedings at property level discussions. In **D'Amico** the Court stated, l. c. 162, 163:

"Essentially the issue presented is whether, in the preliminary investigation and hearing procedure applicable to a minor dispute, the Act vests the plaintiff with the right to counsel. Plaintiff urges that it does, and to support his position he relies upon certain provisions of section 2 of the Act, which, in substance, provide that the 'representatives' of the respective parties to a dispute

shall be designated without interference by either party and that 'no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.' However, these and other provisions of section 2 are directed toward assuring the independence and integrity of employee representatives in the collective bargaining process and that they will serve all the employees they purport to represent with fairness and impartiality and free from carrier coercion or influence.

"A fair reading of section 2, considered in the light of its overall purposes, compels the conclusion that 'representative', as used therein and defined in section 1, Sixth, does not grant to an individual employee involved in a minor dispute with his employer the right of counsel at the hearing of charges at the company level, which is but one of the initial steps in the procedure set up under the Act for the adjustment of disputes."

The Court below relied upon two cases which it said had ruled that an individual has the "privilege" of choosing his own representative for the prosecution of his grievance claim. The first was **Estes v. Union Terminal Co.**, 89 F. 2d 768, 770 (5th Cir. 1937), in which the statement relied upon was dictum. The second case was **General Committee v. Southern Pacific Co.**, 132 F. 2d 194 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338, which is of highly doubtful precedent value if it can be considered any precedent at all.

3. The Railway Labor Act imposes upon carriers by rail a duty to treat exclusively with the majority union representing the craft for purposes of collective bargaining. **Virginian Railway Co. v. System Federation No. 40**, 300 U. S. 515 (1937). The National Mediation Board had certified the System Federation as the designated repre-

sentative for shopcraft employees but the Virginian continued to bargain with a company union. Speaking for the Court, Mr. Justice Stone said:

> "The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." 300 U. S. at 548.

Justice Stone did not limit this admonition to the making of collective agreements. Indeed, in **Virginian Railway**, this Court affirmed a district court injunction which not only required the carrier to bargain with the duly designated agent over rates of pay, rules, and working conditions, but also ordered the railroad to "exert every reasonable effort . . . to settle all disputes, whether arising out of the application of such agreements or otherwise . . ." 300 U. S. at 540. Thus, this Court in **Virginian Railway** recognized that under the Railway Labor Act a carrier's affirmative duty to treat with the certified bargaining agent and its negative duty not to treat with minority unions covered grievance handling and apparently settled the role of the duly authorized representative of the craft with respect to both collective bargaining and grievance adjustment.

In 1945 this Court, in **Elgin, Joliet and Eastern Railway Company v. Burley**, 325 U. S. 711 (1945), considered the rights of an **individual** employee in the settlement of his grievance. We emphasize that this decision must be considered in its proper context. This Court in **Burley** dealt only with the rights of individual employees to reject the

settlement of accrued time claims and did not deal with the rights of minority unions to represent such employees in the processing of their grievances.

This Court, in effect, provided that an individual employee could not be excluded from the settlement of his grievance; that authorizing a union to progress a claim to the National Railroad Adjustment Board does not as a matter of law authorize that union to settle such claim.

The effects of the first **Burley** decision are a matter of history. Rehearing was granted and the original decision "adhered to" 327 U. S. 661 (1946). However, in the words of Mr. Justice Frankfurter, the Court extracted from its first **Burley** opinion "almost all of its vitality" (327 U. S. at 668, dissenting opinion). In its second opinion, this Court simply held that an individual employee who knows that the collective agent is negotiating his grievance with the carrier must affirmatively reject the union's apparent authority or be bound by any settlement.

Some of the Court's statements in **Burley** led to confusion as to the role of the bargaining agent in the grievance process and the continuity, or lack thereof, between collective bargaining and grievance adjustment. When the two **Burley** decisions are read in their proper context, there is no conflict between those decisions and the **Virginian** decision. Only when the **Burley** opinions are broadly construed, as the Court of Appeals did here, does the confusion arise. It was error for the Court to apply the principle announced in **Burley** to rival minority unions. Like the Court of Appeals below, then Attorney General, Tom C. Clark, in his opinion concerning the role of minority unions in the grievance process, 40 Op. A. G. 484 (1946), read too much into the **Burley** decision. The individual's rights under the Railway Labor Act cannot be held to extend to the point where he can inject a rival minority union into the grievance process.

Notwithstanding the broad reading of **Burley** by others, this Court has consistently recognized that because of the nature of industrial self-government, grievance adjustment is a critical, integral phase in the continuing process of collective bargaining, which apparently comes within the collective bargaining agent's exclusive power. Thus, in **United Steelworkers v. Warrior & G. Nav. Co.**, 363 U. S. 574 (1960), this Court said:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions: Some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. **But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.** Arbitration is the means of solving the unforeseeable

by holding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. **The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.**

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. **The grievance procedure is, in other words, a part of the continuous collective bargaining process.** It, rather than a strike, is the terminal point of a disagreement." 363 U. S. at 580-581 (Emphasis supplied).

There can be no real concrete distinction between the processes of collective bargaining and grievance adjustment; since to realize the benefits accruing to the craft through the efforts of the collective bargaining agent, it is necessary to enforce and apply the agreement on a day-to-day basis. The collective agreement has meaning only in the sense that it is applied because adjudications of past grievances, which **Burley** failed to understand, essentially constitute rule making for the future. Collective bargaining for the terms of an agreement, therefore, necessarily implies collective action when enforcing the proper application of that agreement, otherwise the result would be to ignore the future effect of such determinations upon the whole of the craft. Consequently, if under the Railway Labor Act a carrier has a duty to treat exclusively with the duly authorized representative of the craft over rates of pay, rules and working conditions, it has a corresponding duty to treat exclusively with the same representative over the ad-

justment of grievances. See Cox, **Some Aspects of the Labor Management Relations Act,** 1947, 61 Harv. L. Rev. 274, 302 (1948); Cox, **Reflections Upon Labor Arbitration,** 72 Harv. L. Rev. 1482 (1952); Wyle, **Labor Arbitration and the Concept of Exclusive Representation,** 7 B. C. Ind. & Com. L. Rev. 783 (1966).

By insisting that a minority union has the right to participate in grievance proceedings prior to National Railway Adjustment Board consideration, the Court below would interfere with the grievance machinery established through proper negotiations between the company and the duly authorized bargaining agent. The Railway Labor Act gives a minortiy union no such right.

Edwards v. St. Louis-San Francisco Railroad Co., 361 F. 2d 946 (7th Cir. 1966), further emphasizes the conflict between the decision of the Court below and the clear meaning of the Railway Labor Act which provides no right in the employee to a minority union's representation at company level grievance proceedings. In **Edwards,** the Court stated, l. c. 953, 954, 955:

> **"The provisions of the Railway Labor Act govern neither the procedure by which a carrier may discharge its employees nor the conduct of an investigation hearing on railroad property.**
>
> * * * * * * *
>
> "The federal courts are not the guarantors of any rights of either labor or management at the initial hearing either by force of the Constitution or the Railway Labor Act, for, as we have said, **at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them.**
>
> * * * * * * *
>
> "Moreover, appellant's attempt to equate the review functions of the Adjustment Board with pro-

hibited governmental action ultimately resolves itself into a direct attack upon the constitutionality of those provisions of the Railway Labor Act creating the Adjustment Board with authority to finally settle disputes which evolve otherwise unadjusted out of the grievance procedure agreed upon between the parties. If appellant were to prevail on this contention, the Adjustment Board, at best, would have limited jurisdiction to settle only those disputes which had come up through constitutionally acceptable procedures below, and, therefore, **the Railway Labor Act would do indirectly what it does not pretend to do directly, that is, regulate the grievance procedures at the company level, procedures heretofore left to the carrier and the employees to devise for themselves''** (Emphasis supplied).

In **Conley v. Gibson,** 355 U. S. 41 (1957), this Court held that under the Railway Labor Act the exclusive bargaining representative has a duty not to discriminate against individual members of the craft in the adjustment of grievances. This was but a logical extension of **Steele v. Louisville and Nashville R. R. Co.,** 323 U. S. 192 (1944), where this Court first embraced the doctrine of fair representation in the making of collective contracts. The rationale for such a doctrine has been that the right of a union to be the exclusive representative of a craft implies a duty to act on behalf of all members of the craft without discrimination. Since the duty of fair representation derives from the exclusiveness of the right to represent, to the extent that duties and rights correspond, a duty to adjust grievances on behalf of all without discrimination would mean a right to exclusively represent the craft in grievance procedures.

In **Conley,** the railroad had discharged certain Negro employees in violation of the seniority and protection provisions of the collective bargaining agreement ap-

plicable to their craft—and had replaced them with white employees. Because their duly authorized representative had refused to present their grievances, these discharged employees brought suit against the union, alleging hostile discrimination. The union defended on the ground of failure to state a claim, arguing that a representative's duty of fair representation covers only the making of collective bargaining agreements and not grievance adjustment. This Court, however, contrary to dicta in **Burley**, found that collective bargaining is a continuing process which encompasses grievance procedures.

Moreover, this Court emphasized the bargaining representative's role in this process, stating specifically that a minority union cannot adjust grievances on behalf of individual members of the craft:

> "The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the union's alleged discrimination in refusing to represent petitioners. The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. **Nor may a minority choose another agent to bargain in their behalf . . .**" 355 U. S. at 47. (Emphasis added.)

Conley seems to say, therefore, that there is a duty to act on behalf of all members of the craft without discrimination because the majority union has a right to exclusively represent the craft. If their individual em-

ployees could choose a minority union for grievance handling, there would be no need to impose a duty of fair representation upon the majority representative.

While petitioners believe sound reason and precedent point the clear path to be followed in this area, the confusion which arises due to the conflict between **Virginian Railway** and an expansive interpretation of **Burley** should be settled. This is an appropriate case, therefore, for this Court to authoritatively define the role of the exclusive bargaining agent in the grievance process and determine if the railroads have a duty to adjust grievances with minority unions. Indeed, a rule such as indicated in the dicta of **Conley** would effectively avoid the destructive influence of inter-union rivalry. As Professor Cox has observed, permitting minority unions to participate in grievance procedures creates competition among unions which results in an irrational insistence upon the adjustment of trivial and ill-founded grievances:

> "Vesting the union with control of all grievances increases the likelihood of uniformity and therefore reduces 'a potential source of competitions and discriminations that could be destructive of the entire structure of labor relations in the plant.' To deny the majority representative power to control the presentation of grievances offers dissident groups, who may belong to rival unions, the opportunity 'to press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances as a vehicle to build up their own prestige. Imaginary grievances could be conjured up and others which, under ordinary circumstances would be dropped at the first step could be magnified out of all proportion to their importance. The settlement of grievances could become the source of friction and compe-

tition and a means for creating and perpetuating employee dissatisfaction instead of a method of eliminating it." Cox, **Rights Under a Labor Agreement**, 69 Harv. L. Rev. 601, 626 (1956).

Thus, as a practical matter, by excluding minority unions from the grievance process, this Court would do much to obtain labor peace in the railroad industry.

CONCLUSION.

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

Opinion of the District Court.

(Filed January 13, 1967.)

Juergens, Chief Judge

Plaintiffs filed their suit, alleging jurisdiction under Title 28, Sections 1331 and 1337, and the Railway Labor Act, Title 45, Section 151, et seq.

Generally stated, the complaint alleges that defendant is a corporation organized under the laws of the State of Missouri and is engaged in conducting railroad operations and is engaged in interstate commerce; that plaintiffs are employees of defendant; that they began their employment as locomotive firemen and have subsequently qualified as locomotive engineers; that locomotive engineers employed by defendant are represented, for the purposes of the Railway Labor Act, by a railway labor organization known as the Brotherhood of Locomotive Engineers (BLE), which union has from time to time negotiated collective agreements with the defendant for the purpose of establishing rates of pay, rules, etc., governing employment of locomotive engineers on the defendant railroad; that due to seasonal, economic and other considerations, the amount of traffic handled and the switching services performed by the defendant varies from time to time and the number of locomotive engineers and locomotive firemen needed by defendant to perform its services varies; that to meet the varying needs for engineers and firemen, there have been established an engineers' schedule agreement and a firemen's schedule agreement, which contain uniform and reciprocal rules and conditions that enable the employees comprising the firemen's craft and the employees comprising the engineers' craft to shuttle back and forth between the two crafts; that when the plaintiffs are working as

firemen, their employment is governed by the rules contained in the firemen's schedule agreement, and when employed as engineers, the rate of pay, rules and conditions are governed by the engineers' schedule agreement; that in the course of plaintiffs' employment as engineers, grievances and time claims frequently develop and become the subject of disputes; that the grievances and claims are normally presented to defendant's operating officials and are processed in negotiations with defendant's representatives or sometimes presented to the National Railroad Adjustment Board; that prior to November 15, 1965, grievances and claims arising while plaintiffs worked as engineers were subject to the terms and conditions of the engineers' schedule agreement and were customarily presented to the defendant and processed by a representative of the railway labor union of which plaintiffs were members, whether the union be the BLE or other railway labor unions; that on November 15, 1965, the defendant and the BLE entered into an agreement which compelled plaintiffs and other employees of defendant in positions similar to plaintiffs to select only the BLE to be plaintiffs' representative for the purpose of processing and seeking settlement of grievances developing while plaintiffs are employed as locomotive engineers; that subsequent to entering into the agreement, plaintiffs have had claims develop while working as locomotive engineers and have requested the representative of a railway labor organization other than the BLE to process and seek a satisfactory settlement of the claims with the defendant; that the claims were denied; thereafter, the representative of a railway labor union of which claimants are members appealed the claims to defendant's General Superintendent who declined to consider the claims for the reason that the agreement concluded by the defendant and BLE permits an individual engineer to be represented in the handling of claims or grievances only by that union; that the claims were subsequently appealed to defendant's

Manager of Labor Relations and were again denied for the same reason. Plaintiffs seek to have this Court adjudge that the agreement of November 15, 1965 violates the duty imposed upon the carriers by the Railway Labor Act and that by entering into the agreement defendant violated plaintiffs' rights under the Railway Labor Act.

The BLE has filed its motion to intervene as a defendant. The Court has considered the motion and finds that it is well taken. An order will be entered joining the Brotherhood of Locomotive Engineers as a party defendant.

The original defendant and the intervening defendant have both filed motion to dismiss, alleging, among other things, that this Court lacks jurisdiction to entertain the cause of action here presented in that the Railway Labor Act makes provisions for the dispositions of matters presented and provides administrative remedy which gives exclusive jurisdiction for the hearing and settlement of disputes of the type here involved.

The United States District Court for the Western District of Kentucky had for consideration in Switchmen's Union v. Louisville and Nashville R. Co., 130 F. Supp. 220, a matter quite similar to the one presented here. Chief Judge Shelbourne in a very thorough manner examined the matters presented and found that the Court had no jurisdiction to entertain the cause, finding that administrative remedies provided exclusive jurisdiction. The reasoning and conclusion reached in Switchmen's Union (supra) are equally applicable to the factual situation presented here.

The complaint and cause of action will be dismissed for want of jurisdiction.

William G. Juergens,
Chief Judge.

Dated: June 12, 1967.

APPENDIX B.

Opinion of the United States Court of Appeals For the Seventh Circuit.

(February 28, 1968.)

Before Hastings, Chief Judge, and Schnackenberg and Cummings, Circuit Judges.

Cummings, Circuit Judge. Plaintiffs are 52 employees of the Terminal Railroad Association of St. Louis ("Terminal") and are members of the Brotherhood of Locomotive Firemen and Enginemen ("Firemen"). Terminal is a switching terminal serving 14 trunk-line railroads in the St. Louis area. It is a common carrier by railroad and subject to the Railway Labor Act (45 U. S. C., § 151 *et seq.*). The complaint alleges that Terminal violated the Railway Labor Act by entering into a November 15, 1965, agreement with the Brotherhood of Locomotive Engineers ("Engineers"), providing that employees working as locomotive engineers must be represented exclusively by the Engineers' union as to grievances processed on the Terminal Railroad, even though the particular employees are members only of the Firemen's union and wish to be represented by that union. Relying on certain provisions of the Railway Labor Act, plaintiffs in effect are seeking a judgment that would require Terminal to confer and negotiate with the Firemen, the representative designated by plaintiffs, in settling grievance and disciplinary matters.

Plaintiffs began their employment with Terminal as locomotive firemen, and their rates of pay, rules of employment and working conditions were established pursuant to collective bargaining agreements between the Firemen and Terminal. They were later promoted to

locomotive engineers and have seniority status in both crafts. They shuttle back and forth between the two crafts, depending upon the needs of Terminal. When their seniority standings on the engineers' seniority roster are insufficient to permit their continuing work in that craft, they work in the craft of locomotive firemen. When they work as firemen, the collective bargaining contract between the Firemen and Terminal establishes the applicable rates of pay and working conditions; when they work as engineers, the bargaining contract between the Engineers and Terminal governs such matters.

While 17 of the plaintiffs were working as locomotive engineers, they filed time claims with Terminal. These claims were denied at the initial level on Terminal's property. Thereafter, the Firemen's union appealed the claims to Terminal's General Superintendent and then to its Manager of Labor Relations. These officials denied the appeals on the ground that the November 15, 1965, agreement between Terminal and the Engineers permits only the Engineers' union to represent locomotive engineers in the handling of time claims and grievances.

One of said 17 plaintiffs and another plaintiff were involved in accident investigations conducted by Terminal, and still another plaintiff was called as a witness in one of the investigations, but Terminal refused to permit them to be represented by the Firemen because of the November 15, 1965, agreement between Terminal and the Engineers.

These 19 plaintiffs were joined in the litigation by 33 other employees of Terminal who are also members of the Firemen and sometimes work as locomotive engineers. All 52 asked the District Court to void Articles 34 and 35 of the November 15, 1965, Terminal-Engineers' contract as violative of the Railway Labor Act.

Prior to the November 15, 1965, agreement between Terminal and the Engineers, the railroad had for many years permitted locomotive engineers who were members of the Firemen to be represented by that union for the purpose of settling their grievance or disciplinary problems on the property. Subsequently, Terminal has refused to permit the Firemen's union to handle such matters. The reason for this refusal is that Article 34 of the November 15, 1965, agreement between the Engineers and Terminal limits the representation of individual locomotive engineers in the handling of time claims or grievances to the Engineers' union, and Article 35 similarly permits only the Engineers' union to represent individual engineers during the investigation of cases involving their suspension or dismissal.

The District Court permitted the Engineers to intervene and subsequently dismissed the action, holding that the National Railroad Adjustment Board has exclusive jurisdiction over this type of controversy. Concluding that judicial relief is warranted under the Railway Labor Act, we reverse.

This case presents for decision the question left open in *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 344, namely, whether an employee's assertion of "the privilege of choosing his own representative for the prosecution of his [grievance] claims" under the Railway Labor Act is justiciable. Two courts of appeals and then Attorney General Tom C. Clark have ruled that he has such a privilege,[1] and we agree with their conclusions. Because there is such a privilege, federal court jurisdiction follows:

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[1] *Estes v. Union Terminal Co.*, 89 F. 2d 768, 770 (5th Cir. 1937); *General Committee v. Southern Pacific Co.*, 132 F. 2d 194 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338; 40 Op. A. G. 494 (1946).

Ever since *Texas and New Orleans R. Co. v. Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548,[2] the federal courts have consistently held that Congress intended them to enforce the commands of the Railway Labor Act.[3] Therefore, if the Railway Labor Act accords these plaintiffs the right to designate the Firemen's union as their representative for settling grievances, the District Court did have jurisdiction to award appropriate relief unless jurisdiction over this dispute has been granted exclusively to the National Railroad Adjustment Board.

The Railway Labor Act has divided disputes between carriers and their employees into two classes. The major disputes concern the making and maintaining of collective bargaining agreements, whereas the minor disputes concern grievances and contract interpretation or application questions.[4] Of course, as to major disputes, it is unquestioned that the Engineers' union is exclusively entitled to represent the plaintiffs, when working as locomotive engineers, by virtue of Section 2 Ninth of the Railway Labor Act. See *Virginian Railway v. System Federation No. 40,* 300 U. S. 515.

Section 2 Second of the Railway Labor Act provides that all disputes shall be considered "in conference between *representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by*

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[2] This holding was justified by H. R. Rep. No. 328, 69th Cong., 1st Sess., pp. 1-2, where the House Committee on Interstate and Foreign Commerce expressed the desirability of judicial aid to settle questions under the Railway Labor Act.

[3] *Virginian Railway v. System Federation No. 40,* 300 U. S. 515; *Steele v. Louisville & Nashville R. Co.,* 323 U. S. 192; *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768; *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30; *Felter v. Southern Pacific Co.,* 359 U. S. 326.

[4] *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30, 33.

the employees thereof interested in the dispute" (45 U. S. C., § 152 Second; italics supplied). On its face, this provision guarantees an individual employee the right to prosecute his grievances through any representative he may designate. This reading of Section 2 Second is buttressed by the legislative history of the Railway Labor Act of 1934. In the House hearings, both Commissioner Eastman and George Harrison, the spokesman for the standard railroad labor unions, expressed the view that railroad employees have the right to be represented by minority unions in grievance matters.[5] This construction is consonant with other provisions of the Railway Labor Act. Thus Section 2 Third permits employees and carriers to designate representatives without interference from either side, and the representatives of the employees need not even be employees of the carrier. Section 2 Fourth permits individual employees or their local representatives to confer with management during working hours without loss of time.[6] As to minor disputes, Section 2 Sixth provides that the designated representatives of the employees and carriers have the duty to specify the time and place for a conference within ten days after receipt of notice. In Section 3 First (j), Congress concededly granted employees the right to choose any representatives to act on their behalf in handling minor disputes before the National Railroad Adjustment Board. This is also indicative of a similar Congressional intent as to the preliminary negotiations with the carrier.

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[5] Hearings of House Committee on Interstate and Foreign Commerce (73rd Cong., 2d Sess.) on H. R. 7650, pp. 44, 89.

[6] In *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 331, the Court recognized that the commands of Sections 2 Third and 2 Fourth are judicially enforcible. As to Section 2 Second, a similar indication appears in *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 200.

The provisions in Section 3 First (i) that minor disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" is pertinent too. Admittedly, it was the customary practice on the Terminal for a fireman working as a locomotive engineer to select the Firemen's union as his representative for grievance purposes. The Congressional approval of the "usual manner" of handling grievances shows that the Railway Labor Act was not intended to thwart the established practice in this respect.

Besides the foregoing statutory provisions, the landmark case of *Elgin, Joliet and Eastern Railway Co. v. Burley*, 325 U. S. 711, sheds light on this problem. There it was determined that individual employees have the right to present their grievances to the National Railroad Adjustment Board. The Court held that "the individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf." 325 U. S. at p. 740, note 39.[7] Under that interpretation of the Railway Labor Act, it is clear that the Terminal and Engineers cannot nullify these plaintiffs' rights to select the Firemen's union as their representative for grievance purposes. The *Burley* case teaches that individual rights of employees, such as those advanced here, cannot be nullified unless Congress clearly intended such consequences (325 U. S. at pp. 733-734). No such intent is expressed by the language of the Railway Labor Act. In fact, as seen, the statutory language supports plaintiffs.

In *Burley*, it was noted that the individual employee's ideas of appropriate settlement might differ from the

[7] The importance of individual choice was also stressed in *Felter v. Southern Pacific Co.*, 359 U. S. 326, 333-334, when dealing with Section 2 Eleventh (b) of the Act.

union's, so that an individual employee should be permitted to reject a union settlement of a minor dispute unless he had authorized the union to represent him (325 U. S. at p. 736). Similarly, if, as here, individual employees do not care to be represented by the majority union in the processing of minor disputes, they should be able to choose their own union for that purpose. Judge Learned Hand so recognized under the Labor Management Relations Act in *Douds v. Local 1250,* 173 F. 2d 764, 772 (2d Cir. 1949):

> "There only remains the question whether an individual employee or a minority—a 'group'—must negotiate the adjustment of their 'grievance' without the help of a union which it has been their custom to use as their representative. We have little to add to what we said before. Behind the whole Act, indeed, its main presupposition, is the assumption that in industrial negotiations an individual, or a minority, does not bargain on equal terms with an employer. It is not reasonable to suppose that Congress, after giving a minority this privilege, should wish to deprive it of that means of exercising it, which for this reason is the putative condition of its effective use."[8]

Likewise, in *General Committee v. Southern Pacific Co.,* 132 F. 2d 194, 198 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338, the court pointed out the injustice of having one union represent inter-craft employees, some being members of another union, with rival seniority claims. The court observed that "confidence and trust necessary between a suitor and his representative" would be absent if the employees were required

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[8] In *Douds,* Judge Hand approved of and followed Attorney General Tom C. Clark's opinion that the Railway Labor Act invalidates a collective bargaining agreement that prevents an individual from negotiating with the carriers through his own union representative in settling grievances. See 173 F. 2d at p. 773

to be represented by unions of which they were not members.

Terminal and the Engineers urge that the National Railroad Adjustment Board has exclusive jurisdiction to determine the validity of the clauses in the Terminal-Engineers contract making the Engineers' union the exclusive representative of locomotive engineers in settling grievances and disciplinary matters. However, the Supreme Court has decided that contract validity questions are for the courts and not for the Adjustment Board. *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768, 774; *Felter v. Southern Pacific Co.,* 359 U. S. 326, 327, note 3. As in *Steele v. Louisville & Nashville R. Co.,* 323 U. S. 192, 205, the Adjustment Board will not give the relief sought here,[9] so that judicial intervention is necessary.

In an effort to show that the courts have no jurisdiction of this controversy, the Terminal and Engineers lean heavily on *General Committee v. Southern Pacific Co.,* 320 U. S. 338. There the Engineers' union sued for a declaratory judgment that the collective bargaining agreement between the Firemen's union and the Southern Pacific Railway was invalid because it permitted engineers belonging to the Firemen's union to have that union represent them in the handling of their grievances. Following two opinions handed down the same day,[10] the Court concluded that Congress left such "jurisdictional

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[9] See *General Committee v. Southern Pacific Co.,* 132 F. 2d 194, 201 (9th Cir. 1942), reversed on jurisdictional grounds, 320 U. S. 338; *United Railroad Workers of America v. Atchison, Topeka & Santa Fe R. Co.,* 89 F. Supp. 666, 668 (N. D. Ill. 1950); *Switchmen's Union v. Louisville & Nashville R. Co.,* 130 F. Supp. 220, 223-224 (W. D. Ky. 1955).

[10] *Switchmen's Union v. National Mediation Board,* 320 U. S. 297; *General Committee v. Missouri-Kansas-Texas R. Co.,* 320 U. S. 323.

controversies between unions to agencies or tribunals other than the courts" (at p. 344). The dispute there was a pure jurisdictional dispute because the agreement in question did not detract from possible employee rights, but adversely affected only the Engineers' union. Here the individual plaintiffs who work as engineers are adversely affected by the Terminal-Engineers' contract. The question of their right to judicial relief was not involved in the *Southern Pacific* case and was expressly left open (*ibid.*). The Supreme Court's decision in the related *M-K-T* case recognizes that federal courts do have jurisdiction to enforce the commands of the Railway Labor Act (320 U. S. at pp. 329-331), and there is such a command here.

At the oral argument, the Engineers' union admitted it could sue Terminal for breach of contract if Terminal allowed the Firemen's union to represent plaintiffs in these minor disputes. In such a suit, Terminal could raise the invalidity of Articles 34 and 35 as a defense, rendering the issue justiciable. To our mind, Congress certainly did not intend the unfair result of making this question of justiciability depend solely on the carrier's unilateral decision as to whether or not to abide by its contract.

Terminal and Engineers rely on *Broady v. Illinois Central R. Co.*, 191 F. 2d 73 (7th Cir. 1951), certiorari denied, 342 U. S. 897; *Edwards v. St. Louis-San Francisco R. Co.*, 361 F. 2d 946 (7th Cir. 1966); *Brooks v. Chicago, Rock Island & Pacific R. Co.*, 177 F. 2d 385 (8th Cir. 1949), and *Butler v. Thompson*, 192 F. 2d 831 (8th Cir. 1951). Those cases did not involve the unique situation presented here where employees shuttle back and forth between their crafts. Here, by virtue of Section 2 Eleventh (c) of the Railway Labor Act, the plaintiffs have the right to maintain their membership in the Firemen's union even while working as engineers. See *Pennsylvania R. Co. v. Rychlik*,

352 U. S. 480; *Birkholz v. Dirks,* .... F. 2d .... (7th Cir. 1968).

In *Broady,* the employee sought to be represented not by a union with a collective bargaining contract with the railroad, but by a "rival union."[11] *Broady* is not determinative, for this Court did not construe Section 2 of the Railway Labor Act nor discuss the *Burley* case, and Section 2 Eleventh (c) of the Act was not brought to the Court's attention. Since the *Howard* and *Felter* cases had not yet been decided (*supra,* p. 7), one basis for the *Broady* decision was apparently the then prevalent notion that the federal courts had no jurisdiction to pass upon this kind of controversy; the same is true with respect to *United Railroad Workers v. Atchison, Topeka & Santa Fe R. Co.,* 89 F. Supp. 666 (N. D. Ill. 1950). It and *Butler* and *Roberts v. Thompson,* 107 F. Supp. 775 (E. D. Ark. 1952), are likewise distinguishable because they are "rival union" cases. The Terminal and Engineers rely too on *Switchmen's Union v. Louisville & Nashville R. Co.,* 130 F. Supp. 220 (W. D. Ky. 1955), but that opinion was based on the *Broady* and *United Railroad Workers* cases, neither of which is dispositive of the problem at hand.

Edwards did not involve the question whether employees are entitled to be represented by unions of their own choice in grievance matters. The principal question involved was an interpretation of Article 40 of the collective bargaining agreement between the Order of Railway Conductors & Brakemen and the Frisco, a question committed exclusively to the National Railroad Adjustment Board under *Order of Railway Conductors v. Pitney,* 326 U. S. 561, and *Slocum v. Delaware Lackawanna & Western R. Co.,* 339 U. S. 239.

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[11] The term "rival union" as used herein excludes those unions defined in Section 2 Eleventh (c) of the Railway Labor Act and qualified by the National Mediation Board.

Edwards and *Brooks* and other cases on which the Terminal and Engineers rely[12] involve efforts of an employee to set aside an unfavorable grievance decision by challenging the procedures through which it was reached. Such efforts are frowned upon by the courts, for grievance procedures are supposed to be a substitute for litigation. The instant plaintiffs are not trying to overturn unfavorable grievance decisions, so that appellees' cases challenging grievance decisions are not controlling.

It is unnecessary to decide whether the Railway Labor Act would entitle plaintiffs to designate a minority union seeking to dislodge Engineers' union. Our holding is simply that these plaintiffs, already members of the Firemen's Union, can designate that union to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers. To that extent, Articles 34 and 35 of the Terminal-Engineers contract of November 15, 1965, are invalid, but our judgment does not bar the Engineers' union from discussions on the Terminal property or before the National Railroad Adjustment Board when its interests are involved.

Finally, it should be noted that our holding does not encourage the formation of a new minority union. *Cf. Pennslyvania R. Co. v. Rychlik,* 352 U. S. 480. The Firemen's union was long established as the authorized bar-

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[12] *D'Elia v. New York, New Haven & Hartford R. Co.,* 230 F. Supp. 912 (D. Conn. 1964), affirmed, 338 F. 2d 701 (2d Cir. 1964), certiorari denied, 380 U. S. 978; *D'Amico v. Pennsylvania R. Co.,* 191 F. Supp. 160 (S. D. N. Y. 1961); and *Brooks* concerned the alleged right to counsel during grievance proceedings on the railroad property and not the question whether employees have the statutory right to be represented in minor disputes by their union.

gaining representative of these plaintiffs and, as noted, is within the protection of Section 2 Eleventh (c) of the Railway Labor Act. These two unions have lived together and with railroad employers for a long time. To allow the Firemen's union to continue to represent its members in grievance matters would hardly change the balance of power and certainly would not inject a new union into the situation. *Cf. Pennsylvania R. Co. v. Rychlik,* 352 U. S. 480. Section 2 Eleventh (c) of the Act provides that an employee need belong only to one union. Logically, that union should have the right to represent him in grievance proceedings. If appellees were to prevail, Section 2 Eleventh (c) would be rendered a nullity as to these plaintiffs. The "membership" conferred by that Section would, for them, be a naked legal right unaccompanied by any of the ordinary material benefits of belonging to a union. Although our decision means that members of the Firemen's union may have their union represent them in grievances arising while they work as engineers, it also means that members of the Engineer's union have the right to be represented by that union in grievances while they work as firemen. Thus, our decision puts the two unions on a parity with each other and should not cause defections in either direction. In contrast, the effect of the November 15, 1965, agreement between Terminal and the Engineers would discourage membership in the Firemen's union by making it impossible for plaintiffs to be represented by that union in minor disputes.

The judgment is reversed and the cause is remanded with directions to enter judgment for plaintiffs in conformity with this opinion.

APPENDIX C.

Statutes Involved.

Title 45 U. S. C.

§ 152.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if, possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employ-

ees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: ***And provided further***, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

APPENDIX D.

(From the March 8, 1968 Issue of Enginemen's Press.)

BLE AND CARRIER LOSE BATTLE ON 'EXCLUSIVE REPRESENTATION'.

Chicago—The U. S. Court of Appeals for the Seventh Circuit has thwarted a bid by the Terminal Railroad Association of St. Louis and the BLE to force exclusive BLE representation on Terminal engineers in grievance and time claim cases.

In ruling in favor of the employes who brought suit, the Court broke up an alliance between the BLE and the carriers which was formed to block the BLF&E from giving its engineer members the aggressive representation the members felt they should receive.

Three Court of Appeals judges concurred in reversing a lower court decision which upheld a November 15, 1965, agreement between the Terminal and the BLE. The agreement, which the Appeals Court found to be in violation of the Railway Labor Act, coerced engineers into BLE representation when the engineers wished to be represented by the BLF&E.

Noting that many of the engineers on the Terminal had apparently preferred BLF&E representation and customarily received it in minor disputes until the agreement, the Court of Appeals ruled that the engineers involved may choose the union they wish.

The case went to court after 17 Terminal employes who were working as engineers filed time claims which were denied and then appealed by the BLF&E. The Terminal refused to handle the appeals because management said that only the BLE could represent the engineers.

Apparently feeling the BLE representation was no representation, 52 Terminal employes brought suit. The BLF&E was not a party to the suit, although the 52 plaintiffs made it clear that they preferred representation in grievances by that organization.

In rendering its opinion in favor of the employes, the Court of Appeals upheld the right of the engineers involved to "designate that union (BLF&E) to represent them on the Terminal property and before the National Railroad Adjustment Board with reference to time claims and disciplinary investigations occurring while plaintiffs performed the services of locomotive engineers."

The Court also noted that Section 2, Second, of the Railway Labor Act provides that an individual employe has the right to prosecute his grievances through any representative he may designate.

The Court recalled an earlier landmark case which determined that the railroad employes' rights under the Act cannot be nullified merely by agreement between the carrier and the union.

"Under that interpretation of the Act," the Court held, "it is clear that the Terminal and Engineers cannot nullify these plaintiffs' rights to select the Firemen's union as their representative for grievance purposes."

The three Court of Appeals judges concluded their opinion by noting "our decision means that members of the Firemen's union may have their union represent them in grievances arising while they work as engineers. . . ."